84-792 (1)

Office - Supreme Court, U.S.
FILED
NOV 14 1984
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No.

JOSEPH FOERING,

Petitioner

vs.

LAWRENCE STRATTON, WALTER WARZESKI, RAYMOND LUCAS and KUTZTOWN STATE COLLEGE, FORREST G. SCHAEFFER, JR., JACOB SAYSHEN, ALBERT KROMMES, MILDRED S. CORRIGAN, RENEE L. DIETRICH, ADE-ROLFE FLOREEN, FREDERICK J. GIORGI, HERMAN S. PLAVNER, MARY GRACE REILLY, ROBERT C. WILBURN, JAMES MULLEN, FREDERICK J. RICCIUS and DIANE PHIPPS,

Respondents

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
Third Circuit

Richard J. Orloski,
Counsel for Petitioner
CALNAN & ORLOSKI, P.C.
446 Linden Street
Allentown, PA 18102
(215) 435-2727

45pp

INDEX

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT A CLAIM BY A PROFESSOR AT A STATE UNIVERSITY THAT HE WAS DENIED TENURE BECAUSE OF HIS EXERCISE OF HIS CONSTITUTIONAL RIGHT TO FREE SPEECH ON PUBLIC ISSUES PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM UNDER 42 U.S.C. §1983 WHERE THE PROFESSOR PRODUCES EVIDENCE TO SUPPORT HIS CLAIM?

II. WHETHER OR NOT A CLAIM SUPPORTED BY EVIDENCE BY A PROFESSOR AT A STATE UNIVERSITY THAT HIS TENURE WAS DENIED WITHOUT SUBSTANTIVE DUE PROCESS OF LAW IN VIOLATION OF 42 U.S.C. §1983 IN THAT HE WAS NEVER GIVEN AN OPPORTUNITY TO BE HEARD IN FRONT OF A DETACHED AND NEUTRAL FACT FINDER BECAUSE OF THE INTENTIONAL CAMPAIGN BY THE DEFENDANTS TO PREJUDICE THE FACT FINDER AGAINST HIM PRIOR TO HIS HEARING PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM?

INDEX

List of Parties..... 1

Table of Authorities..... 3

Official and Unofficial Reports..... 4

Statement of Jurisdiction..... 4

Constitutional & Statutory Provisions. 4

Statement of the Case..... 5

Argument:

I. WHETHER OR NOT A CLAIM BY A PROFESSOR AT A STATE UNIVERSITY THAT HE WAS DENIED TENURE BECAUSE OF HIS EXERCISE OF HIS CONSTITUTIONAL RIGHT TO FREE SPEECH ON PUBLIC ISSUES PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM UNDER 42 U.S.C. §1983 WHERE THE PROFESSOR PRODUCES EVIDENCE TO SUPPORT HIS CLAIM?..... 28

II. WHETHER OR NOT A CLAIM SUPPORTED BY EVIDENCE BY A PROFESSOR AT A STATE UNIVERSITY THAT HIS TENURE WAS DENIED WITHOUT SUBSTANTIVE DUE PROCESS OF LAW IN VIOLATION OF 42 U.S.C. §1983 IN THAT HE WAS NEVER GIVEN AN OPPORTUNITY TO BE HEARD IN FRONT OF A DETACHED AND NEUTRAL FACT FINDER BECAUSE OF THE INTENTIONAL CAMPAIGN BY THE DEFENDANTS TO PREJUDICE THE FACT FINDER AGAINST HIM PRIOR TO HIS HEARING PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM?..... 29

Conclusion.....30

APPENDIX:

Bench Opinion of United States District Court per Cahn, J., dated December 29, 1983.....31

Order of United States District Court per Cahn, J. dated January 6, 1984.....39

Judgment Order of United States Court of Appeals, 3rd Circuit, dated September 18, 1984.....40

(a) QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT A CLAIM BY A PROFESSOR AT A STATE UNIVERSITY THAT HE WAS DENIED TENURE BECAUSE OF HIS EXERCISE OF HIS CONSTITUTIONAL RIGHT TO FREE SPEECH ON PUBLIC ISSUES PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM UNDER 42 U.S.C. §1983 WHERE THE PROFESSOR PRODUCES EVIDENCE TO SUPPORT HIS CLAIM?

II. WHETHER OR NOT A CLAIM SUPPORTED BY EVIDENCE BY A PROFESSOR AT A STATE UNIVERSITY THAT HIS TENURE WAS DENIED WITHOUT SUBSTANTIVE DUE PROCESS OF LAW IN VIOLATION OF 42 U.S.C. §1983 IN THAT HE WAS NEVER GIVEN AN OPPORTUNITY TO BE HEARD IN FRONT OF A DETACHED AND NEUTRAL FACT FINDER BECAUSE OF THE INTENTIONAL CAMPAIGN BY THE DEFENDANTS TO PREJUDICE THE FACT FINDER AGAINST HIM PRIOR TO HIS HEARING PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM?

(b) LIST OF PARTIES

Petitioner:

Joseph Foering represented by Richard J. Orloski, of Calnan & Orloski, P.C.

Respondents:

Lawrence Stratton, Walter Warzeski, Raymond Lucas and Kutztown State College, Forrest G. Schaeffer, Jr., Jacob Sayshen, Albert Krommes, Mildred S. Corrigan, Renee L. Dietrich, Ade-Rolfe Floreen, Frederick J.

Giorgi, Herman S. Plavner, Mary Grace Reilly, Robert C. Wilburn, James Mullen, Frederick J. Riccius and Diane Phipps, represented by Carl Vaccaro, Esquire, Deputy Attorney General, Commonwealth of Pennsylvania.

(c) TABLE OF AUTHORITIES

Goldberg v. Kelley 397 US 254 (1970)..... 29

Perry v. Sinderman 408 US 593 (1972)..... 28

(d) OFFICIAL AND UNOFFICIAL REPORTS

(e) STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit, was entered on September 18, 1984, and the Petition For Writ Of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Court rests upon Rule 20.2 of the Rules of the Supreme Court, and 28 U.S.C. §2101(c).

(f) CONSTITUTIONAL AND STATUTORY PROVISIONS

> "Nor shall any state deprive any person of Life, Liberty or property without due process of law..."
>
> Fourteenth Amendment to the U.S. Constitution

"Every person who, under color of any statute...subjects...any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution...shall be liable to the party injured..."

42 U.S.C. §1983

(g) STATEMENT OF THE CASE

Petitioner, Joseph Foering, earned a B.A. in sociology with a concentration in criminal justice from LaSalle College where he graduated summa cum laude in 1975. He received his M.A. in Criminal Justice in 1976 from SUNY at Albany, New York. (Para. 1 of Affidavit, hereinafter "Aff").

Petitioner graduated from the Phila. Police Academy in 1967 and for 1½ years thereafter worked as a policeman. (Para. 2 of Aff).

From January, 1969 until he was hired by Kutztown in January, 1978, Petitioner worked as a probation/parole officer for the court in Philadelphia County, Pennsylvania, carrying a caseload of almost two hundred probationers. (Para. 3 of Aff).

While employed as a Probation/Parole officer,

Petitioner taught Criminology in the evening division of LaSalle College in 1977. (Para. 5 of Aff). On January 11, 1978, Petitioner was contacted by Kutztown State College regarding a position teaching criminal justice. (Para. 6 of Aff). On January 12, 1978, Petitioner was interviewed for the position, and received notification that same evening that he was selected. (Para. 7 of Aff).

On January 13, 1978, Petitioner met with President Stratton and was formally hired in accordance with the collective bargaining agreement. (Para. 8 of Aff). In order to accept the job at Kutztown, Petitioner took a sizeable cut in salary and lost nine years of seniority. (Para. 9 of Aff).

When Petitioner began his employment on Monday January 16, 1978, President Stratton expressly informed him that the Secretary of Education of Pennsylvania expected that he would develop the criminal justice program from within its present departmental setting into a new, separate, and distinct department within the

college community, and Petitioner was appointed Coordinator of the effort. (Para. 10 of Aff; Para. 2 of 2nd Aff). President Stratton informed him that the criminal justice program was being temporarily housed in the Department of Social Science/Philosophy, and that he would be a member of the Social Science/ Philosophy Department. (Para. 10 of Aff).

The establishment of the criminal justice program as a separate and independent entity within the instutition was considered important. As long as the criminal justice program was confined within the Department of Social Sciences and Philosophy, professors from other disciplines were able to restrict Petitioner from teaching areas of inquiry that were highly relevant to criminal justice, e.g., the relationship between poverty and crime, the unequal treatment of minority groups within the criminal justice system, and the impact of political decision makers on the criminal justice system. (Para. 3 of 2nd Aff).

From the outset, Petitioner took his job as a

professor very seriously. His teaching style had always been to encourage debates between students and himself on current events and controversial political issues. (Para. 17 of Aff). The topics discussed included whether having enough money was the only prerequisite to being elected to office; how a law enforcement system operates more ruthlessly under a mayor like Frank Rizzo; how congressmen such as Dan Flood can corrupt a law enforcement system; how there are political problems behind enforcing laws like Superfund; how the law treats wealthy white-collar criminals much less harshly than it treats lower income people. Petitioner specifically used as examples of criminal wrongdoing Richard Nixon and Hooker Chemical Company. (Para. 17 of Aff). The students especially enjoyed debating controversial issues and discussing current events. (Para. 18 of Aff). Petitioner tried to encourage independence of the Criminal Justice Program so that new courses and forums would be opened for discussing current events on a controversial issue. Addition-

ly, Petitioner encouraged independence of the program so that students could receive an education that was served by other disciplines, but not made biased and inaccurate because of control by other disciplines. Petitioner felt this would improve the student and the system in which he or she was being trained to serve. (Para. 19 of Aff).

As soon as Petitioner began encouraging independence of the criminal justice program and began expressing his beliefs about how the criminal justice system operates, President Stratton and the rest of the administration opposed him, including Respondents, Warzeski and Lucas. (Para. 20 of Aff). Letters concerning the administration of the criminal justice program were sent by the Dean to the chairmen of Political Science and Social Science Departments, but copies were not sent to Petitioner as Coordinator of the Criminal Justice Program. It was difficult for Petitioner to create new criminal justice course while he was being excluded from the decision

making process. (Para. 21 of Aff).

On March 9, 1979, Petitioner telephoned Samuel G. Marcus, Chief of Bureau of Academic Progress, Department of Education at Harrisburg, and advised him of the difficulties in implementing the mandate of the Secretary of Education that the Criminal Justice Program be developed into a new, separate and distinct department. (Para. 22 of Aff). On March 22, 1979, a memorandum was delivered to Dean Warzeski, which attempted to outline specific remedies recommended by the Pennsylvania Department of Education for implementing the mandate of the Secretary of Education. (Para. 23 of Aff). In response to this memorandum, Dean Warzeski telephoned Petitioner and advised him that the administration at Kutztown had no intention of implementing the recommendations of the Pennsylvania Department of Education or to hasten the development of the Criminal Justice Program into a separate department. (Para. 24 of Aff).

Throughout the rest of the spring and into the

Fall, Petitioner continued to encourage his students to debate controversial political issues. (Para. 25 of Aff). Petitioner would get into heated political discussions about the same political issues that were being discussed in class, in different faculty lounges with other faculty members. Professor Lucas and Professor Tinsman were often present. Plaintiff expounded upon his belief that many aspects of criminal justice systems were corrupt. He also discussed the fact that there is a disproportionate number of black persons in prison, and that this shows that there is something wrong with the criminal justice system. Professor Lucas, a Southern born and educated man, in particular, did not agree with his views about blacks. (Para. 26 of Aff). Toward the end of the Fall, 1979 semester, Petitioner began commenting on the upcoming political election. He was opposed to Ronald Reagan and his policies and expressed his viewpoint that the Democrats will increase social welfare and help the criminal justice system operate judiciously, and that the Republicans

would try to convert the system so that big business would benefit at the expense of the American people. Petitioner also stated that the Democrats do not condone white-collar crime as do the Republicans, and that when the Democrats are in office, white-collar crime is treated with the severity with which it deserves. (Para. 27 of Aff). In late Fall, 1979, some members of the faculty including Professor Lucas, complained to President Stratton and Dean Warzeski about Petitioner's political beliefs. (Para. 28 of Aff).

Despite his excellent student and peer evaluations, Petitioner was chastised for expressing his beliefs that the criminal justice students would benefit from the independence of a criminal justice program as an independent forum for exploring controversial political issues. (Para. 29 of Aff). In the Fall of 1979, Petitioner overheard Professor Lucas saying that he did not like what Petitioner was saying in his classes, and the Department would have to "get its act together" in order to get rid of him. Professor Lucas thereafter told

Petitioner that if he would voluntarily quit in fall of 1979, that "something could be worked out". Petitioner declined, and on February 4, 1980, Professor Miller wrote a letter to Dean Warzeski asking that Petitioner not be given tenure. (Para. 30 of Aff). Petitioner did not want to cause further dissention among the faculty or administration, so, in January 1980, he resigned the position of coordinator of the Criminal Justice Program but continued his faculty status. By this time, the program had grown from approximately 50 declared majors in January, 1978 to 150 in January, 1980. (Para. 31 of Aff).

From January 1980 on, Chairman Lucas, Dean Warzeski and President Stratton engaged in retaliatory activities against Petitioner so that he would be denied tenure. In the Fall of 1979, Professor Lucas began his job as Chairman of the Social Sciences/Philosophy Department. On October 31, 1979, after being Chairman for just two months, he rated Petitioner as "excellent." On January 25,

1980, after learning of Petitioner's political views, and his opinion on the necessity of indepdence for the Criminal Justice Program, Professor Lucas called together the whole department for the purpose of re-evaluating Petitioner. Professor Lucas opened the meeting with defamatory statements about Petitioner, including allegations that he had committed immoral acts with female students, and announced that Petitioner would have to go, and encouraged other department members to be hostile to Petitioner. Lucas then retracted his previous Fall, 1979 evaluation and substituted it with a rating of "unsatisfactory". (Para. 33 of Aff).

The Department of Social Sciences and Philosophy met as a committee of the whole to make evaluations, and his comments reached the entire department. From that time on, a few people in the Department ran a concerted campaign to deny Petitioner tenure. (Para. 34 of Aff). On January 25, 1980, Professor Lemieux of Petitioner's Department wrote a letter to

Dr. Stratton with the stated purpose of cancelling "the beneficial effect" of a complimentary letter she had previously written about Petitioner to Dr. Stratton in 1978. (Para. 35 of Aff).

The Fall, 1979 department evaluation issued with Dr. Lucas' participation in January, 1980 contained such outrageous defamatory and unprovable allegations about Petitioner including that Petitioner had sexually approached female students, that the College's attorney told the department to make a re-evaluation without including the unfounded hearsay allegations. As a result of this counsel, the Department deleted the hearsay allegations, but left the overall rating of "unsatisfactory". (Para. 16 of Aff). Certain members of the department, with the encouragement of Dr. Lucas, circulated a letter asking that Petitioner not be granted tenure, and forwarded it to Dr. Warzeski. (Para. 37 of Aff).

During all of his years at Kutztown, student

evaluations of Petitioner were excellent and peer evaluations of him were "satisfactory" on a scale which included only "satisfactory", "unsatisfactory" or "not able to respond". Accordingly, Petitioner was given a "satisfactory" rating by the Department Promotion Evaluation and Tenure Committee for his first three semesters. Then beginning in the Fall of 1979, and for most of his remaining semesters at Kutztown, the PET Committee evaluated him "unsatisfactory". (Para. 38 of Aff).

In Spring of 1980, before Petitioner was evaluated for the Spring semester, President Stratton called a meeting of the Social Sciences/Philosophy department (excluding Petitioner), in order to discuss how Petitioner could be denied tenure. Dr. Lucas and Dr. Stratton outlined the procedures. Dr. Stratton repeatedly stated that no one had anything to worry about because he would see to it that Petitioner would not be given tenure. "Getting their ducks lined up" was discussed, i.e., how they could deny Petitioner tenure in a way

that would appear proper. Also discussed was what should and should not be included in future evaluations of Petitioner. (Para. 39 of Aff).

In the Fall of 1980, President Stratton held another meeting with the department with Petitioner again excluded, in which he discussed how quickly the school could get rid of Petitioner and what the procedure would be. President Stratton made Petitioner's personnel file available to all the department members at the meeting contrary to the terms of the collective bargaining agreement. (Para. 46 of Aff).

In the Fall of 1980, the department under Professor Lucas' direction made up a new procedure for evaluating Petitioner. (Para. 47 of Aff). When it came time for the College Wide Tenure Committee to evaluate Petitioner, they invited only members of the department who were against Petitioner and excluded members who supported him.

On February 27, 1981, Petitioner examined

his official personnel file and found the report of the College Wide Tenure Committee. The report included defamatory hearsay statements and negative evaluations about him which had been the subject of his 1980 grievance, and which were still being grieved to the Secretary of Education. Petitioner had never seen or received a copy of the report, but had only received a copy of the one page decision of the Committee which stated that he should not be rehired. His official personnel file contained additional defamatory material which had been placed there by the President without being presented to him first for reading and his signature as required by the collective bargaining agreement. Virtually all positive materials about Petitioner were missing from the file. (Para. 52 of Aff).

On March 24, 1981, Dr. Stratton first denied and then admitted to Petitioner that he had shown the personnel file, compiled only with the negative information, to the Board of

Trustees. (Para. 53 of Aff). This was part of his strategy to obtain the support of the Board for his recommendation to deny Petitioner tenure which would be made in the future.

Petitioner grieved the fact that his personnel file had been improperly compiled and that the President had improperly shown the "distorted" file to the Board of Trustees. The President denied the grievance and procrastinated with respect to responding to both of the grievances so neither one ever reached arbitration prior to the decision to deny Petitioner tenure. (Paras. 54 and 55 of Aff).

The Due Process Hearing Committee was not neutral and detached and was, in fact, biased against Petitioner. The three members of the Committee were subject to the President's authority in many respects. For example, the President has authority to fire those committee members and to promote, award and discipline them. Dean Warzeski has author-

ity to approve and disapprove budgets with respect to these committee members. Most importantly, President Stratton and the administration had held several meetings about Petitioner and publicly condemned him in order that the members were aware of his attitude even before the hearing began. The committee members were aware of the administration's bias against Petitioner, and were pressured by the administration to find against him. (Para. 61 of Aff).

At all relevant times, Petitioner was continuously advised that his classroom performance was good in that he knew his material, and that he was a skillful teacher. (Para. 6 of 2nd Aff). According to statements attributed to the Defendants, Stratton and Warzeski, if classroom performance was the test for granting or denying tenure, Petitioner would definitely have received tenure. (Para. 7 of 2nd Aff).

In his advocacy of the establishment of a separate criminal justice department in order

to promote academic freedom, Petitioner was opposed by the Defendant, Lucas, after he became promoted to chairman of the Department of Social Sciences and Philosophy. (Para. 8 of 2nd Aff). Defendant, Lucas, had two specific objections to Petitioner: 1) he specifically disapproved of the course content and what he perceived to be Petitioner's "liberal" views of social issues involved in the criminal justice area; and 2) he specifically wanted to stop--or at least delay as long as possible--the implementation of the criminal justice program as a separate department in order to maintain the status of the Department of Social Sciences and Philosophy. (Para. 9 of 2nd Aff).

Even though Petitioner was personally aware that his department chairman, Defendant, Lucas, was opposed to his views concerning the relationship between poverty and crime, the unequal treatment of minority groups, particularly blacks within the criminal justice system, and the impact of political

decision makers on the criminal justice system, Petitioner continued teaching his course as he saw proper and in accordance with his knowledge and expertise. (Para. 10 of 2nd Aff). In January of 1980, his department chairman, Defendant, Lucas, inaugurated a retaliatory campaign against Petitioner to deny him tenure for two reasons: 1) he did not want a person who he believed to hold "liberal" social and political views to be on the faculty; and 2) he believed that Petitioner's removal from the faculty would delay--and maybe even stop--the development of the criminal justice program into a separate department at Kutztown State College. (Para. 11 of 2nd Aff). Defendant Lucas discussed the case with at least 18 other faculty members and encouraged them to actively participate in the campaign to deny Petitioner tenure because he felt that Petitioner had a political axe to grind and that he used his classroom as a pulpit for discussion of political issues. (Para. 12 of 2nd Aff). In April of 1980, the Defendant,

Lucas, met with Defendants, Stratton and Warzeski, and requested Petitioner's immediate discharge from Kutztown State College. (Para. 12 of 2nd Aff). At this meeting, the Defendant, Stratton, upon advice of the Pa. Attorney General's office, told the Defendant, Lucas, that there was no"just cause" for his termination. (Para. 14 of 2nd Aff). The Defendant, Stratton, further advised the Defendant, Lucas, that he should not be distressed with the decision to temporarily retain Petitioner because the decision to grant-or deny-tenure rested solely with him, and he, Stratton, in conjunction with Warzeski, had already decided not to grant Petitioner tenure. (Para. 15 of 2nd Aff).

At the meeting in April, 1980, and again at a meeting in Fall, 1980, Defendants, Stratton, Warzeski and Lucas, conspired together to "get their duck lined up" so, that, when the decision to deny tenure would be made, it would be upheld by the Due Process Committee. (Para. 16 of 2nd Aff). At the meeting in April, 1980, Defendants, Stratton and Warzeski

specifically outlined a step-by-step program of actions to be taken in order to assure that the Due Process Committee affirm and ratify the decision not to grant Petitioner tenure, including the usage of a protracted public dialogue, and making false accusations about him, in order to prejudice the would-be members of the Due Process Committee against Petitioner. (Para. 17 of 2nd Aff).

After the meeting in April, 1980, the Defendants implemented the plan to deny Petitioner tenure, including the spreading of false and malicious rumors about him to the would-be arbitrators on the Due Process Committee. (Para. 20 of Aff). The false rumors specifically reached each and every member of the Due Process Committee and was the real basis of their discussions to deny Petitioner tenure. (Para. 21 of 2nd Aff). The Due Process Committee was not capable of giving Petitioner a fair hearing because they had heard false rumors about him and had also been informed that the Defendants including President Stratton and Dean Warzeski, the two most powerful and influential people

within the university were strongly opposed to Petitioner's getting tenure. (Para. 22 of 2nd Aff). The Due Process Committee merely copied the decision of his department's Promotion, Evaluation and Tenure Committee, and the College Wide Tenure Committee, and although he was a competent professor, Petitioner was denied tenure because of his expression of political views and because of his opinion that the criminal justice program be an independent department. (Para. 23 of 2nd Aff).

Finally, the result of the Defendants' action has been to destroy Plaintiff's career as a college teacher. Because of the adverse publicity and negative public record, Petitioner has been unable to obtain another position in teaching, or related to criminal justice. (Para. 88 of Aff).

At the deposition of President Stratton, he confirmed that, at all relevant times, the Petitioner was considered a good professor, and that the Defendant, Lucas, initially began the campaign to deny Petitioner tenure:

"Q. Well, Doctor, in other words, if I understand you, you are saying everything was positive until you received some type of written communication from Lucas?
A. Right.
Q. And Lucas was the Chairman of the department?
A. Right."

(N.T., 25)

"Q You said you had serious reservations about Joe Foering's performance as a teacher. Why did you have serious reservations?
A. Well, when I read that letter [from Lucas], the whole picture raised questions in my mind in that letter."

(N.T., 28)

"Q. What about his performance as a teacher?
A. The reports were that they had been positive.
Q. Well, what does that mean, Doctor, Positive?
A. I don't know what that means.
Q. Well, I mean, the reports indicated-the reports you were getting back indicated that he was functioning in a satisfactory capacity--
A. And the students seemed to like him. That's in those reports that I have just mentioned, every one of them"

(N.T., 32)

"Q. Okay. So he was doing his job as a teacher in the classroom and he had a positive impact on the students in that he had good--
A.I don't knqw about impact on students. I can't say.
Q. But you knew that the--
A. He seemed to be doing all right.
Q. But the PR, the public relations-he seemed to have raport with the students?
A. Yes.
Q. And he was doing his job in the classroom?
A. Apparently." (N.T. 33)

At the deposition of Dean Warzeski, the Dean specifically contradicted the President[1] and confirmed that the President orchestrated the campaign to deny Petitioner tenure, and that the President told Defendant, Lucas, and others that they must line up their ducks if they wanted to succeed:

> "Q. Was there any discussion saying we have to get our ducks lined up or anything of that nature?
> A. I believe there was a reference made to that concept, that if the dismissal was to be put into effect, it would have to have followed the right procedure; therefore, the concept was get your ducks lined up, yes." (emphasis added) (N.T. 76)

At the deposition of Dr. Lucas, he confirmed that he was motivated to obtain the denial of tenure by Petitioner's political beliefs:

> "Q. What type of complaints were there about the way he conducted his classes?
> A. That he usually had some sort of political axe to grind or something of that sort. I have no idea of what the details were. They were just what other faculty members had said to me that students had said to them." (N.T., 113).

Despite these facts, the trial court found that 1) there was no evidence of a retaliatory cam-

[1] At the President's deposition, he specifically denied that he told the persons "to get your ducks lined up." (N.T.49).

paign against the Petitioner because of his exercise of his right of free speech under the First Amendment; and 2) there was no evidence of a denial of due process of law. Hence, the trial court granted summary judgment in favor of Defendants and against Petitioner. The United States Court of Appeals, Third Circuit, affirmed without opinion. This Petition For Writ Of Certiorari is now before the Court for disposition.

(h) ARGUMENT

I. WHETHER OR NOT A CLAIM BY A PROFESSOR AT A STATE UNIVERSITY THAT HE WAS DENIED TENURE BECAUSE OF HIS EXERCISE OF HIS CONSTITUTIONAL RIGHT TO FREE SPEECH ON PUBLIC ISSUES PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM UNDER 42 U.S.C. §1983 WHERE THE PROFESSOR PRODUCES EVIDENCE TO SUPPORT HIS CLAIM?

1. In Perry v. Sinderman 408 US 593 (1972), this Court held that nonrenewal of a nontenured professor's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment Rights, and that a grant of summary judgment against the professor without full exploration of the constitutional issues was inappropriate where evidence indicated that State College Professor had publicly disagreed

with the College Administration's views.

In the case at bar, it was the combined impact of Petitioner's "liberal" political beliefs and his campaign for a separate department for the criminal justice program to foster academic freedom which caused Petitioner to be denied tenure. This is impermissible under Perry v. Sinderman, supra.

II. WHETHER OR NOT A CLAIM SUPPORTED BY EVIDENCE BY A PROFESSOR AT A STATE UNIVERSITY THAT HIS TENURE WAS DENIED WITHOUT SUBSTANTIVE DUE PROCESS OF LAW IN VIOLATION OF 42 U.S.C. §1983 IN THAT HE WAS NEVER GIVEN AN OPPORTUNITY TO BE HEARD IN FRONT OF A DETACHED AND NEUTRAL FACT FINDER BECAUSE OF THE INTENTIONAL CAMPAIGN BY THE DEFENDANTS TO PREJUDICE THE FACT FINDER AGAINST HIM PRIOR TO HIS HEARING PRECLUDES THE ENTRY OF SUMMARY JUDGMENT AGAINST HIM?

1. In Goldberg v. Kelley 397 US 254 (1970), this Court indicated that, in pretermination hearings, the person being deprived of his "property interest" is entitled to minimum procedural safeguards. An impartial decisionmaker is a basic constituent of minimum due process.

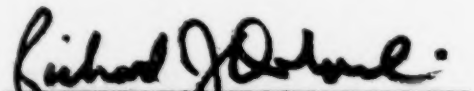
In the case at bar, the jury must determine whether or not the Defendants pre-empted the arbitration hearing by prejudicing the

three arbitrators even before they were selected to hear the case by their protracted public campaign of false accusations against Petitioner. Hence, summary judgment is inappropriate.

(i) CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari must be granted.

CALNAN & ORLOSKI, P.C.



Richard J. Orloski,
Attorney for Petitioner
446 Linden Street
Allentown, PA 18102
(215) 435-2727

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH FOERING Plaintiff	:	
	:	CIVIL ACTION
vs.	:	
LAURENCE STRATTON, et al., Defendants	:	NO. 82-5356

Allentown, Pennsylvania
December 29, 1983
2:45 o'clock p.m.

BEFORE: THE HONORABLE EDWARD N. CAHN, J.

MOTION FOR SUMMARY JUDGMENT
OPINION OF THE COURT

THE COURT: I am going to grant summary judgment in favor of the defendant and I want to state my reasons for the record. We will entitle this Bench Opinion in this case.

The Plaintiff originally instituted a Civil Rights action against Kutztown University, and a number of individual defendants who were officers and trustees of that institution. In order to avoid Eleventh Amendment problems an amended complaint was filed

which eliminated the University as a defendant.

The defendants subsequently filed motions to dismiss which were denied with the understanding that the issues briefed by the defendants could be raised after discovery pursuant to a motion filed under Federal Rule of Civil Procedure 56.

The facts of the case are relatively uncomplicated. Joseph Foering, the Plaintiff, was a nontenured professional employee at Kutztown University. He was involved in the Criminal Justice Program at that institution and was hired to implement this program. From all reports, he was an effective classroom teacher, but encountered difficulties with his superiors when he became adamant that the Criminal Justice Program should become a separate department at Kutztown.

His point of view in this regard was communicated to the State Department of Education who had adopted a position that a separate department for criminal justice should be

established at certain State higher educational institutions.

The Department did communicate its position to the plaintiff's superiors at Kutztown.

Thereafter, Plaintiff encountered a number of personal problems with other faculty members which are fully detailed in the voluminous record compiled during tenure review proceedings, and during discovery in this case.

After numerous committees reviewed whether or not Plaintiff should have tenure at Kutztown, all found that he should not, and the University President recommended to the Board of Trustees that tenure not be granted, and it was not granted.

Plaintiff then appealed to the State Department of Education and his appeal to that Board was denied. Plaintiff then brought the instant action.

Plaintiff is not proceeding under any claims based on Title VII. Instead he is proceeding under 42 U.S.C. section 1983, and

28 U.S.C. section 1343. He alleges that his Fourteenth Amendment rights have been violated by the employment decision made at Kutztown by the defendants.

Plaintiff's claims can be divided into three segments. His first claim is that he was not granted tenure because of his adamant position that the Criminal Justice Program at Kutztown should be a separate department. It is true that Plaintiff took that position, and it is true that the defendants were opposed to Plaintiff's position.

The difficulty with Plaintiff's claim is that in Connick versus Myers, 78 LED 2D 708 (1983) the Supreme Court held that Fourteenth Amendment rights encompassed in the First Amendment be not protected where the subject matter is internal to the public organization. An exception is made if the disagreement the employee has with his superiors is a matter of some public importance.

Comparing the Connick case with the case at bar, I find that the possibility of dif-

ficulties in the operation of a District Attorney's office is less of an important public matter than whether or not Kutztown has a separate department for its Criminal Justice Program.

Plaintiff's next thrust is that he was denied due process of law in the decision of the employer whereby his application for tenure was denied. The procedure at Kutztown for review of tenure decisions is specific and affords a nontenured professional employee adequate due process. A number of reviews are held, starting with the faculty in an applicant's own department, and throughout the process extending to tenured employees who are selected at random to make a review.

The recommendation of these bodies was negative in regard to tenure for the Plaintiff.

After the President of the University, who is a named defendant, accepted the recommendation of the faculty's committee and

denied tenure, the Plaintiff had a further opportunity to appeal to the Department of Education, and his appeal in that regard was denied. This process has given Plaintiff all that is due under the constitution.

Plaintiff's final thrust is more troubling. Plaintiff's attorney suggests for the first time, after the Connick decision was handed down, that another reason for the denial of tenure is that Plaintiff is perceived on the campus as a liberal Democrat, and that such philosophy is not acceptable in the rural atmosphere at Kutztown University.

In fact, at oral argument, Plaintiff's attorney suggested that another named Defendant, Lucas, who has much to say in regard to the tenure decision, was a racist and opposed to black citizens. There are several problems with these assertions. The most serious is that the claim Plaintiff was not given tenure because he is a liberal Democrat surfaced only after all of the tenure review procedures were completed administratively.

Although asked, Plaintiff's counsel could not point to any record reference that this subject was raised during any of the many tenure review hearings.

It should be pointed out that at one tenure review hearing, three days of hearings were held with attorneys present and with a stenographic record being made.

I would be more inclined to deny summary judgment in this case if Plaintiff could be specific about his assertions that his political leanings affected the tenure decision.

Although asked to point to record references, Plaintiff's counsel was unable to illustrate any concrete evidence that the tenure decision was affected by the political beliefs of the Plaintiff.

In my view, this is simply an employment decision with which Plaintiff disagrees, and he is attempting to have the decision reviewed on a constitutional basis, when there is no basis to do that.

Consequently, I will enter summary judg-

ment in favor of all of the defendants. The record should show that this Bench Opinion is being dictated without benefit of shepherdizing the cases referred to, and I reserve the right to edit the Bench Opinion, to syntax in grammer, to add citations, to add footnotes in the event the Plaintiff appeals.

- - -

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH FOERING,

vw.

LAWRENCE STRATTON, et al.

CIVIL ACTION

NO. 82-5056

O R D E R

FILED JAN. 6, 1984

AND NOW, this 4th day of January, 1984, after hearing oral argument and after considering the defendants' motion for summary judgment, IT IS ORDERED:

1. Summary judgment is hereby entered in favor of all of the defendants and against the Plaintiff for the reasons set forth in a bench opinion dictated December 29, 1983.

2. Consequently, judgment is hereby entered in favor of all of the defendants and against the plaintiff.

BY THE COURT:

/S/ Edward N. Cahn
Edward N. Cahn, J.

ENTERED: 1-6-84

CLERK OF COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1012

FOERING, Joseph,

Appellant

v.

STRATTON, Lawrence, WARZESKI, Walter, LUCAS, Raymond and KUTZTOWN STATE COLLEGE, SCHAEFFER, Jr., Forrest G. SAYSHEN, Jacob, KROMMES, Albert, CORRIGAN, Mildred S., DIETRICH, Renee L., FLOREEN, Ade-Rolfe, GIORGI, Frederick J., PLAVNER, Herman S. REILLY, Mary Grace and WILBURN, Robert C., MULLEN, James, RICCIUS, Frederick J., PHIPPS, Diane

---

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-5056)
District Judge: Honorable Edward N. Cahn

Submitted Under Third Circuit Rule 12(6)
September 14, 1984

BEFORE: GIBBONS and GARTH, Circuit Judges

ROSENN, Senior Circuit Judge

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/S/ JOHN J. GIBBONS
Circuit Judge

ATTEST:

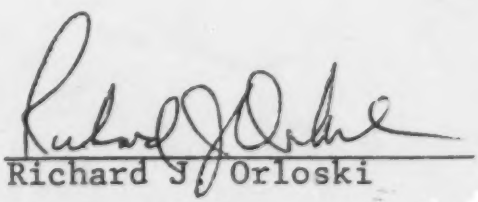
/S/ BETTY J. ROBINSON
Deputy Clerk

DATED: September 18, 1984

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of Petition For A Writ Of Certiorari From the United States Court Of Appeals upon the following person by depositing same in the United States Mail, regular, first-class mail, postage prepaid, addressed as follows:

Carl Vaccaro, Esquire
Deputy Attorney General
Commonwealth of Pennsylvania
206 State Office Building
Philadelphia, PA 19130



Richard J. Orloski

DATED: November 14, 1984

Office-Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-792

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH POERING

Petitioner

v.

LAWRENCE STRATTON, WALTER WARZESKI, RAYMOND LUCAS, and KUTZTOWN STATE COLLEGE, FORREST G. SCHAEFFER, JR., JACOB SAYSHEN, ALBERT KROMMES, MIDLRED S. CORRIGAN RENEE L. DIETRICH, ADE-ROLPH FLOREEN, FREDERICK J. GIORGI, HERMAN S. PLAVNER, MARY GRACE REILLY, ROBERT C. WILBURN, JAMES MULLEN, FREDERICK J. RICCIUS and DIANE PHIPPS

Respondents

On Petition For Writ of Certiorari
to The United States Court of Appeals
For the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

ANDREW S. GORDON
Senior Deputy Attorney General
Counsel of Record

ALLEN C. WARSHAW
SENIOR DEPUTY ATTORNEY GENERAL
CHIEF, LITIGATION SECTION

CARL VACCARO
DEPUTY ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 351-2402

18

QUESTION PRESENTED

SHOULD THE SUPREME COURT REVIEW THE DECISION OF THE COURT BELOW WHEN REVIEW WOULD INVOLVE ONLY QUESTIONS OF FACT DECIDED UNDER WELL-ESTABLISHED PRINCIPLES AND WHEN THE DECISION OF SUCH QUESTIONS IS OF INTEREST ONLY TO THE PARTIES IN THIS CASE.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF CITATIONS	iii
STATEMENT OF THE CASE	2
ARGUMENT.....	9
CONCLUSION.....	14

TABLE OF CITATIONS

	PAGE
Connick v. Myers, No. 81-1251 (April 20, 1983)....	11,12
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938).....	10
Layne and Bowler Corp. v. Western Well Works, Inc. 261 U.S. 387 (1922)	10
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 273 (1977).....	12
National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951).....	10
United States v. Johnston, 268 U.S. 220 (1925).....	10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-792

JOSEPH FOERING

v.

Petitioner

LAWRENCE STRATTON, WALTER WARZESKI, RAYMOND LUCAS, and KUTZTOWN STATE COLLEGE, FORREST G. SCHAEFFER, JR., JACOB SAYSHEN, ALBERT KROMMES, MILDRED S. CORRIGAN, RENEE L. DIETRICH, ADE-ROLPH FLOREEN, FREDERICK J. GIORGI, HERMAN S. PLAVNER, MARY GRACE REILLY, ROBERT C. WILBURN, JAMES MULLEN, FREDERICK J. RICCIUS and DIANE PHIPPS

Respondents

On Petition For Writ of Certiorari
to The United States Court of Appeals
For the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

In this action filed pursuant to 42 U.S.C. § 1983, the district court granted summary judgment for respondents, officers and trustees of Kutztown State University, on petitioner's claim that denial of his request for tenure violated the First and Fourteenth Amendments. The Court of Appeals affirmed without opinion.

The undisputed material facts of record show that the petitioner was hired by Kutztown State College in January 1978. During petitioner's employment, Kutztown and its faculty were parties to a collective bargaining agreement. This agreement, in part, provided that new members of the faculty would serve a three year probationary term of employment during which they would be evaluated for tenure. After three years, a faculty

member either would be granted tenure or would be terminated. (C.A. App. 21a - 23a).[1]

As a new member of the faculty, petitioner was evaluated for tenure. The chairman of petitioner's department, his department's tenure committee, and fifteen of the seventeen members of his department recommended that he be denied tenure. (C.A. App. 31a - 42a).

Petitioner's tenure application was then considered by a college-wide tenure committee. After reviewing the departmental recommendations and hearing the testimony of petitioner and other faculty members, this committee unanimously recommended that petitioner be denied tenure. (C.A. App. 44a-47a). Petitioner then requested a formal hearing.

---

[1]"C.A. App." refers to the appendix filed in the Court of Appeals.

Pursuant to the collective bargaining agreement, there was assembled a hearing committee composed of three members of the faculty and a legal advisor from outside the college community. The committee was selected as follows:

1. Eleven names from the entire faculty of the college, other than faculty from petitioner's department were chosen at random. From this list of eleven, the college and petitioner could each peremptorily strike four names. The parties then had an unlimited number of challenges for cause.

2. The committee's legal advisor was chosen from a list of attorneys or arbitrators prepared jointly by the college and petitioner's union. The legal advisor chosen was agreed upon by petitioner and the college. (C.A. App. 55a-62a).

The hearing committee selected by petitioner and the college held a hearing lasting three full days. The hearing was comparable to a court trial and was conducted in accordance with formal procedures, including pre-hearing discovery, counsel representation, testimony of witnesses under oath and subject to cross-examination, an unlimited right to offer relevant evidence, stenographic recording of the proceedings, legal arguments and briefs, a written decision of the committee containing findings and conclusions based upon the credible evidence of record. (C.A. App. 55a-62a).

After the hearing record was transcribed and briefs were submitted by counsel for the parties, the hearing committee issued a written decision and unanimously concluded that just cause existed to deny tenure. Among the numerous specific findings made by the

committee were that petitioner had assaulted a fellow faculty member, appeared on campus reeking of marijuana, accused another faculty member of stealing his marijuana, failed to prepare manuals and other materials required for his courses, and combined two separate courses into one thereby doing half the work that he had been assigned. The committee made numerous other findings detailing petitioner's unsatisfactory professional conduct. (C.A. App. 64a - 68a).

Petitioner appealed the decision denying him tenure to the Pennsylvania Secretary of Education. On November 11, 1981, the Secretary "[a]after careful consideration of the records including the transcripts of the hearing, the briefs filed by the respective attorneys, the decision of the Due Process Committee and [Petitioner's] letter of September

10, 1981," determined that substantial evidence existed for the decision to deny tenure. (C.A. 72a).

None of the members of the committees that recommended denial of tenure is a defendant in this case. It is also undisputed that the defendants in this case had no communications with the hearing committee members regarding petitioner's tenure (C.A. App. 174a - 175a; 210a -211a; 238a - 239a). In addition, the hearing committee members who found sufficient cause to deny petitioner tenure filed unrebutted affidavits in the district court averring that they based their decision solely on the credible evidence disclosed during the hearing.

The record below also contains the more than seven hundred page transcript of petitioner's tenure hearing,

including petitioner's lengthy testimony. The transcript reveals no evidence that petitioner's alleged free speech played a role in the tenure decision.

The district court granted respondents' motion for summary judgment. (Pet. 39). The court found, after examining the affidavits and other materials submitted by respondents, that petitioner failed adequately to controvert the respondents' position that his denial of tenure was based on merit and the procedures afforded to petitioner were sufficient to satisfy due process. The court of appeals affirmed. (Pet 40-41).

ARGUMENT

Petitioner seeks to have this Court review a decision of the Third Circuit Court of Appeals upholding the entry of summary judgment for the respondents. The questions presented by the petition for a writ of certiorari are limited to the particular facts of record in this case and are of interest only to the parties to it. Petitioner states "no special or important" reasons for review and indeed no such reasons exist in this case.

The petition for certiorari is nothing more than a request to have this Court undertake a third review of an extensive factual record to determine whether the district court correctly decided that the record showed the absence of genuine disputes of material fact requiring the entry of summary

judgment. This Court has ruled frequently that factual reviews are not appropriate tasks for this Court. National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498, 503 (1951); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178-179 (1938); United States v. Johnston, 268 U.S. 220, 227 (1925).

The questions raised by the petition turn entirely on the facts of record in this particular case. Such questions have already been resolved twice in favor of respondents and are without impact or significance outside the limits of this particular case.[2]

---

[2]Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1922) (certiorari appropriate only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties ....").

The petition for a writ of certiorari should be denied.

1. In his complaint and two amended complaints, petitioner alleged that he was denied tenure because he expressed his view that the criminal justice program at Kutztown State College should be a separate department. After this Court's decision in Connick v. Myers, No. 81-1251 (April 20, 1983), seemed to defeat this claim, petitioner for the first time sought to allege that he was denied tenure because he talked to his students and fellow faculty members about controversial issues.

In moving for summary judgment, defendants submitted overwhelming evidence showing that petitioner was denied tenure for reasons having absolutely nothing to do with his alleged free speech activities and that the decision to deny tenure was made

largely by persons other than the named defendants. For his part, petitioner offered nothing but conclusory statements setting forth his views and beliefs regarding why he was denied tenure. As a result, the entry of summary judgment was entirely correct and consistent with the applicable decisions of this court. See Connick v. Myers, No. 81-1251 (April 20, 1983); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 273 (1977).

2. The petitioner's Fourteenth Amendment procedural due process claim was based on the alleged lack of impartiality of the hearing committee that found cause for the denial of tenure. Petitioner's claim was totally refuted by the undisputed facts of record. These facts included unrebutted affidavits by the members of the hearing committee averring that they based their

decision on the credible evidence of record, and the unrebutted testimony of respondents that they had no communications with the members of the hearing committee regarding petitioner's tenure (see 174-172a; 210a, 211a; 238a-239a). Also, under the relevant procedures, petitioner had an unlimited right to challenge the members of the hearing committee for bias or other just cause and yet he did not do so until the matter was completed and decided adversely to him. Petitioner submitted nothing to support his conclusory claim of lack of impartiality. As a result, the Court's decision granting summary judgment for defendants was entirely correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

LEROY S. ZIMMERMAN
Attorney General

ANDREW S. GORDON
Senior Deputy Attorney General
Counsel of Record

Allen C. Warshaw
Senior Deputy Attorney General
Chief, Litigation Section

Carl Vaccaro
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 351-2402